STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR
RELATIONS BOARD CASE NO JLP-523

-AND-

THE TOWN OF BURRILLVII

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter Board on an Jnfair abor Practice Complaint (hereinafter "Complaint issued by the Board against the own of Burrillville (hereinafter "Employer") based upon an nfair abor Practice Charge (hereinafter "Charge") dated ebruary 6, 1997 and filed on ebruary 997 by the Burrillville ocal 369, International Brotherhood of Police Officers ereinafter Jnion" or IBPO

The Charge alleged

> Burrillville Local 369, IBPO alleges that the Town of Burrillville violated the General Laws of R.I., specifically R.I.G.L. 28-7-12 and 28-7-13 (3), (5),(7) and (10) on January 31, 1997 when it informed members of the bargaining unit that they could not have a union representative present at a disciplinary interview. Members sough to invoke their Weingarten rights, and the Town Solicitor still refused to allow a union representative to be present at the interview. (See attached.)

Following the filing of the Charge, an informal conference was held on March 5 1997 between representatives of the Union and Respondent and an Agent of the Board When the informal conference failed to resolve the harge, the Board reviewed the matte and issued the instant Complaint on October 15 1998 he mployer did not file an answer to the complaint Instea on February 22 the nployer's attorney filed an entry of appearance and a motion to dismiss, alleging that the Board's complaint was untimely

A formal hearing on this matter was held on ebruary 23, 1999 In lieu of witness testimony, the Union and the mployer submitte a ten 10) page Agreed Statement of

Facts" and a listing of 17 Joint exhibits which were entered into the record at the hearing. After brief oral argument, the parties rested their cases. Thereafter, on April 20, 1999, the Employer filed a post hearing memorandum reiterating its position as to why a dismissal was warranted.

POSITION OF THE PARTIES

The Union argues that in addition to the Law Enforcement Officer's Bill of Rights, police officers in Burrillville are also afforded the protection of the so called "Weingarten rights", as enunciated by the United States Supreme Court in NLRB v. J. Weingarten, Inc. 420 U.S. 251 (1975).[2] As such, when union members request union representation at a meeting which the members reasonably believe may lead to discipline, the employer must permit union representation. The union argues that the notices sent to the four police officers in this case, by including reference to the facts and circumstances surrounding the employees' conduct during a breathalyzer test and their preparation of police reports on the same, clearly provides a reasonable basis upon which the employees could have believed that they might be subject to disciplinary action. Therefore, when they requested union representation, they should have been able to have union representation of their own choice, present at the meetings.

The Employer first argues that, although the Town of Burrillville acknowledges that Weingarten generally applies to police officers, Weingarten rights do not attach when the Town is conducting a criminal investigation concerning the scope of conduct of the police officers. (TR p. 37, Post hearing brief p 4) The Employer also argues that even if Weingarten applies, the Town has not violated the rights of the union members because they were, in fact, represented by legal counsel, who was also a union representative. Finally, the Employer argues that, since the Board did not hold a formal hearing on this matter within 60 days of the date the charge was filed, then the Complaint is untimely and

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[1] The Board accepts and adopts the agreed statement of facts and incorporates the same herein by reference and appends the statement as Exhibit B to this decision.

[2] In Weingarten, the United States Supreme Court held that the presence of union representation during an interview which an employee reasonably believes may lead to discipline falls within the scope of an employee's Section 7 [of the NLRA] right to engage in concerted activities for the purpose of mutual aid and protection. Id at 251. The Court reasoned that union representation advances bargaining unit member's interests by ensuring that employer does not initiate or continue a practice of imposing discipline unjustly. An employee's right to union representation only arises when the employee reasonably believes that the meeting is part of an investigation that could result in disciplinary action and the responsibility to request union representation lies with the employee.

must be dismissed. In support of this last argument, the Town cites a Rhode Island Supreme Court decision in Steven M. Clarke v. Richard Morsilli, et al (Slip opinion issued July 14, 1998.)

DISCUSSION

Since the Town's last argument is potentially dispositive of this case, we shall address that issue first The Town argues that the Board's failure to comply with the timeframes for hearings set forth in R.I.G.L. 28-7-9 (b) (5) requires nullification of the Board's decision. While the Rhode Island Supreme Court has not specifically addressed whether the timeframes set forth in R.I.G.L. 28-7-9 (b) (5) are directory or mandatory, the Rhode Island Superior Court, in State of Rhode Island, Department of Administration vs Rhode Island State Labor Relations Board, C.A. No. 97-4890 (Cresto, J.), held that timeframes are directory. The Board herein adopts and reasserts the rationale for Judge Cresto's findings set forth in that decision and incorporates them here by reference. (Copy of decision attached as Exhibit A). Therefore, the Town's motion to dismiss on the basis of an untimely hearing is denied.

The Employer also argues that, although Weingarten applies to "all members of the Burrillville Local 369, IBPO," Weingarten rights do not attach when the Burrillville Police Department is conducting a criminal investigation. (See employer's brief, p. 15) The Employer also argues that this Board's prior Weingarten decisions, particularly ULP-4925, Rhode Island State Labor Relations Board and the Town of Bristol are factually and legally distinguishable. The Town argues that the basis for the Board's decision in Bristol was that a criminal investigation did not take place, the investigation was merely a disciplinary proceeding, and therefore, Weingarten applied. The Town of Burrillville has misread the Bristol decision. In that case, the Board was merely rejecting the credibility of the Town of Bristol's proffered defense. The Board did not reach the question of whether or not Weingarten is, in fact, applicable to criminal investigations.

In the present case, there is still no need to reach the question of whether or not Weingarten applies within the context of a criminal investigation. The allegation in the complaint is that the failure to provide Weingarten protections within the scope of a disciplinary interview constitutes an unfair labor practice. As set forth above, the parties submitted an Agreed Statement of Facts. The very last paragraph (#33) of that joint

statement states: "The procedure for discharge and discipline of Police Officers shall be in accordance with the Law Enforcement Bill of Rights (G.L. 48-28.6-1) as amended." The parties are bound by their own agreement concerning the procedure for discharge and discipline, and we look to the Law Enforcement Officers' Bill of Rights to see whether union representation at disciplinary interviews is required.

§ 42-28.6-2. Conduct of investigation

Whenever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency, for a non-criminal matter which could lead to disciplinary action, demotion, or dismissal, the investigation or interrogation shall be conducted under the following conditions:

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the law enforcement officer is on duty.

(b) The interrogation shall take place at an office within the department previously designated for that purpose by the chief of police.

(c) The law enforcement officer under interrogation shall be informed of the name, rank, and command of the officer in charge of the investigation, the interrogating officer, and all persons present during the interrogation. All questions directed to the officer under interrogation shall be asked by and through one interrogator.

(d) No complaint against a law enforcement officer shall be brought before a hearing committee unless the complaint be duly sworn to before an official authorized to administer oaths.

(e) The law enforcement officer under investigation shall, prior to any interrogating be informed in writing of the nature of the complaint and of the names of all complainants.

(f) Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary.

(g) Any law enforcement officer under interrogation shall not be threatened with transfer, dismissal, or disciplinary action.

(h) Deleted.

(i) If any law enforcement officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, he or she shall be completely informed of all his or her rights prior to the commencement of the interrogation.

(j) At the request of any law enforcement officer under interrogation, he or she shall have the right to be represented by counsel of his or her choice who shall be present at all times during the interrogation. The interrogation shall be suspended for a reasonable time until representation can be obtained.

(k) No statute shall abridge nor shall any law enforcement agency adopt any regulation which prohibits the right of a law enforcement officer to bring suit arising out of his or her duties as a law enforcement officer.

(l) No law enforcement agency shall insert any adverse material into any file of the officer unless the officer has an opportunity to review and

receive a copy of the material in writing, unless the officer waives these rights in writing;

(m) No public statement shall be made prior to a decision being rendered by the hearing committee and no public statement shall be made if the officer is found innocent unless the officer requests a public statement; provided, however, that this subdivision shall not apply if the officer makes a public statement. The foregoing shall not preclude a law enforcement agency, in a criminal matter, from releasing information pertaining to criminal charges which have been filed against a law enforcement officer, the officer's status of employment and the identity of any administrative charges brought against said officer as a result of said criminal charges.

(n) No law enforcement officer shall be compelled to speak or testify before, or be questioned by, any non-governmental agency.

Clearly, subsection (j) provides that an officer under investigation is entitled to be represented by *counsel* of choice. The question then becomes whether the word counsel could be construed to include someone other than a licensed attorney. According to Black's Law Dictionary, 6th edition, "counsel" is defined as "attorney or counselor" and a counselor is defined as "an attorney, lawyer." It seems clear to this Board then that the procedure to which the parties have contractually agreed only makes provision for the right to counsel, not the right to union representation

Moreover, it would appear that even if the parties had not included this provision within their collective bargaining agreement, this procedure is dictated by existing case law in Rhode Island The Rhode Island Supreme Court has repeatedly held that the "Law Enforcement Officer's Bill of Rights" is the *exclusive remedy* for permanently appointed law enforcement officers subject to proposed disciplinary action." Lynch v. King, 120 R.I. 868; 391 A.2d 17, 1976); City of Pawtucket v. Ricci, 692 A.2d 678, 682 (1997) citing City of East Providence v McLaughlin, 593 A.2d 1345. 48 1991); In re Sabetta, Robert G., 661 A.2d 80, 83 (1995)

FINDINGS OF FACT

The Board adopts and incorporates the Agreed Statement of Facts attached hereto as Exhibit B as its findings of fact as if expressly set forth herein.

CONCLUSIONS OF LAW

1) The timeframe for hearing set forth in R.I.G.L. 28-7-9 (b) (5) is directory.

2) The Union has not proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (3), (5), (7) or (10).

ORDER

The complaint is hereby dismissed.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Gina A. Vigliotti, Chairperson

Frank J. Montanaro, Member (Dissent)

Joseph V. Mulvey, Member (Dissent)

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

Paul E. Martineau, Member

John R. Capobianco, Member (Dissent)

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated January 27, 2000

By: Joan N. Brousseau, Administrator

(97-4890) EXHIBIT A Fi' ' January 22, 1999

JAN 2 5 1999

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

STATE OF RHODE ISLAND
DEPARTMENT OF ADMINISTRATION

V. C.A. No. 97-4890

RI STATE LABOR RELATIONS BOARD
ET AL.

DECISION

CRESTO, J. This case is before the Court on appeal from a decision of the Rhode Island Labor Relations Board (Board) finding that the raud Prevention Unit of the Worker's Compensation Division (Unit) constitutes a proper unit for collective bargaining purposes Jurisdiction is pursuant to R.I.G.L § 42-35-15.

Facts/Travel

The plaintiff, the State of Rhode Island Department of Administration (plaintiff), is an employer as defined in the Rhode Island Labor Relations Act. See R.I.G.L. § 28-7-1 et seq. The defendant, the Board, is a Rhode Island administrative agency. he defendant, the Rhode Island Alliance of Social Service Employees (Union), is a labor organization which is located in Providence, Rhode Island

In 1992, the Rhode Island General Assembly created the Unit which was charged with the duty of "formulat[ing] an integrated state plan to reduce and prevent fraud arising out of claims made pursuant to the workers' compensation laws of this state." See G.L. § 42-11-15

The Unit is composed of nine individuals to include one (1) Chief Investigator, six (6) Fraud Investigators, one (1) Investigative Attorney, and one (1) clerical employee.

On (or about) September 12, 1994, the Union filed a petition for investigation and certification of representatives with the Board desiring to be certified as the Unit's exclusive bargaining agent, and seeking a determination that members of the Unit constituted an appropriate bargaining unit.

On (or about) January 20, 1995, the board held an informal conference in an attempt to arrive at an agreement regarding a consent election. No agreement was reached, so the matter was scheduled for a formal hearing which was held on (or about) May 2, 1995. All parties were present and were represented by counsel. On (or about) July 17, 1997, the board issued a decision granting the Union's petition directing that an election be conducted within ninety (90)

Plaintiffs filed a statement of objection to the board's decision on (or about) August 8,

On (or about) September 4, 1997, an election was conducted for the unit employees. Following the election, the Union was designated as the official bargaining representative for the Unit, and on (or about) September 9, 1997, the board filed a certification of representatives. The Plaintiff filed the instant appeal on October 8, 1997.

The plaintiff is now properly before the court, having preserved the right to appeal by filing an objection to the board's decision. See Barrington School Comm. V. Labor Rel. Bd., 608 A.2d 126, 1132 (R.I. 1992). The plaintiff contends that the board erred in finding that the Unit constitutes a proper unit for collective bargaining purposes and in ordering that an election be conducted. Specifically, plaintiff argues that there was no evidence demonstrating a community of interest between the employees and other members of the union, that the Chief

Investigator is a supervisor whose position does not properly belong in the bargaining unit, that the Clerical position is that of a confidential employee, and that the board's failure to comply with the statutory time periods outlined in G.L. § 28-7-9(b)(5) requires a reversal of the board's decision.

Standard of Review

The review of a decision of the Commission by this Court is controlled by R.I.G.L § 42-35-15(g), which provides for review of a contested agency decision:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This section precludes a reviewing court from substituting its judgment for that of the agency in regard to the credibility of witnesses or the weight of evidence concerning questions of

Costa v. Registry of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988); Carmody v. R.I. Conflict of Interest Commission, 509 A.2d 453, 458 (R. 1986). Therefore, this Court's review is limited to determining whether substantial evidence exists to support the Commission's decision. Newport Shipyard v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I

"Substantial evidence" is that which a reasonable mind might accept to support a conclusion. Id. at 897. (Quoting Caswell v. George Sherman Sand & Gravel Co., 120 R.I. 1981

424 A.2d 646, 647 (1981)). This is true even in cases where the court, after reviewing the certified record and evidence, might be inclined to view the evidence differently than the agency. Berberian v. Dept. of Employment Security, 414 A.2d 480, 482 (R.I. 1980). This Court will 'reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Milardo v. Coastal Resources Management Council, 434 A.2d 266, 272 (R.I. 1981). However, questions of law are not binding upon a reviewing court and may be freely reviewed to determine what the law is and its applicability to the facts. Carmody v. R.I. Conflicts of Interests Commission, 509 A.2d at 458. The Superior Court is required to uphold the agency's findings and conclusions if they are supported by competent evidence. Rhode Island Public Telecommunications Authority, et al. v. Rhode Island Labor Relations Board, et al., 650 A.2d 479, 485 (R.I. 1994).

Determination of a Bargaining Unit

The plaintiff argues that the board erred in granting the union's petition for investigation and certification. Specifically, plaintiff contends that there was no evidence demonstrating a community of interest between the employees and other members of the union. The defendants disagree with plaintiff's position, arguing that the proposed unit is appropriate for collective-bargaining purposes.

In R.I. Public Telecommunications Authority, the Rhode Island Supreme Court discussed the issue of determination of bargaining unit membership for collective-bargaining purposes. Id. at 486. In its decision, the court noted the policy of the NLRB: "When determining the membership of units for collective-bargaining purposes, the NLRB has as its primary concern the grouping together of "'only employees who have substantial mutual interest in wages, hours,

and other conditions of employment.'" Id. (quoting Fifteenth Annual Report of the NLRB, 39 (1950)). "In making such a determination, the board is not required to choose *the* most appropriate bargaining unit but only *an* appropriate bargaining unit." Id. The court adopted the community of interest doctrine, utilized by the NLRB, in order to decide if employees in a unit are "sufficiently concerned with the terms and conditions of employment so as to warrant their participation in the selection of a bargaining agent." Id.

In determining whether there exists a community of interest, the court in R.I. Public Telecommunications Authority adopted factors relied on by the NLRB. Those factors are:

> "1. Similarity in scale and manner of determining earnings,
> 2. Similarity of employment benefits, hours of work, and other terms and conditions of employment,
> 3. Similarity in the kind of work performed,
> 4. Similarity in the qualifications, skills, and training of the employees,
> 5. Frequency of contact or interchange among employees,
> 6. Geographic proximity,
> 7. Continuity or integration of production processes,
> 8. Common supervision and determinations of labor relations policy,
> 9. Relationship to the administrative organization of the employer,
> 10. History of collective bargaining,
> 11. Desires of the affected employees; and
> 12. Extent of union organization." Id.

After review of the record this Court finds substantial evidence to support the board's decision. There is sufficient evidence from which this Court may infer that there existed a community of interest among all nine members of the unit. First, the positions in the Unit were created by the same statute; that statute being G.L. § 42-11-15 Also, the Unit has a common purpose; that is, "to formulate an integrated state plan to reduce and prevent fraud arising out of claims made pursuant to the workers' compensation laws of [Rhode Island]." See G.L. § 42-11-15(a). Finally, all of the positions in the unit, according to the statute, are positions in the

unclassified service. Id. In upholding this particular portion of the board's decision, this Court stresses that the issue at bar is whether an appropriate unit exists and not one of accretion.

Supervisor

The plaintiff argues that the Chief Investigator is a supervisor whose position does not properly belong in the bargaining unit. The defendants contest plaintiff's argument contending that the Chief Investigator is not a supervisor whose position is excludable from the bargaining unit. In a rescript, this Court previously discussed the standard for supervisor. See Narragansett Bay Water Quality Management District Commission v. Rhode Island Labor Relations Board, et al., C.A. No., 97-3923, filed June 26, 1998, Cresto, J. The Court will reiterate that same standard and discussion here.

In defining the term supervisor, the Rhode Island Supreme Court has looked to federal law for direction. Accordingly, a supervisor is defined as

> "'any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature,* but requires the use of independent judgment.'" (Emphasis Added.) Bd. Of Trustees v. RI State Labor Rel. Bd., 694 A.2d 1185, 1189 (R.I. 1997)(quoting 29 U.S.C. § 152(11)).

See also Fraternal Order of Police, Westerly Lodge No. 10 v. Town of Westerly, 659 A.2d 1104, 1108; State v. Local No. 2883, AFSCME, 463 A.2d 186, 190, n.4 (R.I. 1983). "Managers and supervisors are those who carry out and often help formulate the employer's policies." Local No. 2883, 463 A.2d at 191. As such, the "inclusion of managerial and supervisory employees in a collective-bargaining unit would upset the delicate balance of power between management and

labor." Bd of Trustees, 694 A.2d 1189 (citing Local 2883, 463 A.2d at 190) (discussing NLRB v. Bell Aerospace Co., Division of Textron, Inc., 416 U.S. 267, 94 S.Ct 1757, 40 L.Ed.2d 134 (1974) and NLRB v. Yeshiva University, 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980)). "Managerial and supervisory employees may not engage in collective bargaining.' Bd. Of Trustees, 694 A.2d at 1190 (citation omitted.)

The Rhode Island Supreme Court has given examples of employees vested with "managerial" or "supervisory" authority. In Local No. 2883, the court found that a school superintendent was clearly a "supervisory and/or managerial employee." Id. at 191. In arriving at this conclusion, the court noted the superintendent's panoply of duties:

> "Doctor Smith's job description required him explicitly to perform supervisory and managerial duties. In general he was required to 'plan, organize, coordinate and direct the work' of all staff at the Ladd School. Among other things, he was required to 'be responsible for the work of the staff,' to 'consult with superiors relative to the policies and objectives of the institution,' and to 'make rules and regulations governing the work of all services of the institution.'" Id. at 191, fn. 7.

The court concluded the superintendent could not be a member of a bargaining unit. In Westerly Lodge #10, our Supreme Court found that members of the Westerly Police Department, specifically police captains and lieutenants, were "supervisory or managerial personnel." Id. at 1108. Here, the court noted the captains' and lieutenants' responsibilities:

> "The responsibility of lieutenants and captains to assume the role of chief under certain conditions in the Westerly police department makes these officers supervisory or managerial personnel. Their responsibilities to discipline, command, and adjust grievances of lower ranking officers further support this conclusion, in addition to their duties to effectuate departmental policy and make recommendations for certain actions regarding personnel." Id.

The court concluded that these members of the Westerly Police Department should be excluded from the collective bargaining unit.

Most recently, in Bd.of Trustees, the Rhode Island Supreme Court gave an example of employees who were not supervisors within the meaning of 29 U.S.C. § 52(11). In arriving at this decision, the court declined to "reiterate each of the board's findings," not[ing] only that none of the library's four full-time employees had the authority to hire or to fire subordinates, to discipline them, or to adjust employee grievances." Id. at 1190 (emphasis added.) Classifying the supervisory authority held by the four employees as "'merely routine or clerical [in] nature,'" the court concluded that the employees could partake in the library's proposed collective bargaining unit. Id.

In the instant matter, the board noted the responsibilities of the Chief Investigator, Mr. Groeneveld. "The Chief Investigator's position provides for supervision of the Clerical and Investigative staff, the management and development of a filing system, coordination of data entry procedures, preparation of written reports as required, and the maintenance of a case management program." See Decision at 3 After a review of the record, this Court finds that the Chief Investigator's position is not supervisory so as to warrant exclusion from collective bargaining. Mr. Groeneveld's position lacks the recognized indicia of a person's acting in an administrative capacity. These indicia significantly include the power to hire, to fire, to discipline and to adjust grievances. See Bd of Trustees, 694 A.2d at 1190.

A review of the record demonstrates that Mr. Groeneveld has no authority to fire or to discipline. In fact, when asked, Mr. Groeneveld testified that he "[did not] know how the disciplinary system works in terms of staff." (Tr. 19). Further, Mr. Groeneveld said that if a disciplinary measure arose, he "believe[d] [he] would have input in terms of the disciplinary

infraction;" however, he would "present [it] to the Director of Administration." (Id.) Also, although, Groenveld testified that he has set some internal policies, he also conceded that all the policies had to be approved by the Assistant Director of Administration. (Tr. 29). In conclusion, the record demonstrates, and the Court finds that Mr. Groeneveld lacked the authority to hire or fire or discipline. Groeneveld's duties, are merely routine and clerical; his position need not be excluded from the bargaining unit.

Confidential Employee

The plaintiff further argues that the Clerical position is that of a confidential employee. As such, plaintiff contends that the position should not be included in the bargaining unit. The defendants disagree with plaintiff's position, contending that the individual in the clerical position is not a confidential employee.

Like supervisors, confidential employees are excluded from membership in collective bargaining units. Barrington School Comm, 608 A.2d at 1136. The policy, of course, is rooted in fairness. As stated in Barrington School Committee, "it would be unfair for an employee who is entrusted with advance knowledge of his or her employer's labor relations policies to be able to share this information with a union that serves as that employee's collective bargaining representative. Id. In Barrington School Committee, our state Supreme Court adopted the National Labor Relation Board's "labor nexus" test for determining whether or not an employee's position is confidential. Id. That test specifically excludes two categories of confidential employees from collective bargaining. Those categories of confidential employees include those (1) "'who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management polices in the field of labor relations'" and (2) those who

regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.'" Id.

Upon reviewing the record and pertinent case law, this Court concludes that the plaintiff's confidential employee argument is specious. First, as stated above, Mr. Groeneveld is not a supervisor. There is no indication that he is or will be involved in formulating, determining, and effectuating management polices in the field of labor relations. As such, the clerical position does not meet the first prong of the labor-nexus test. Finally, there is no indication that the clerical employee falls within the second prong of the labor nexus test. Plaintiff's evidence with respect to which employees would be involved in the bargaining process is speculative at best. There is no way of knowing what positions would actually be involved in the collective bargaining process.

Compliance with G.L. § 28-7-9(b)(5)

The plaintiff now argues that the board's failure to comply with the statutory time periods outlined in G.L. § 28-7-9(b)(5) requires a reversal of the board's decision. Specifically, plaintiff contends that the formal hearing, which this Court notes plaintiff attended without objection, See generally, Caldarone v. Zoning Board of Review, 74 R.I.196, 60 A.2d 158 (R.I. 1948), should have been held no later than November 12, 1994 and that the board's decision should have been issued no later than July 2, 1995. The defendants disagree with plaintiff's position, arguing (1) that the time frame provisions in G.L. § 28-7-9(b)(5) are directory and not mandatory, and (2) that the plaintiff's failure to raise this issue before the board precludes argument before this court.

Section 28-7-9(b)(5) of the Rhode Island General Laws provides:

> "All charges of unfair labor practices and petitions for unit classification shall be informally heard by the board within thirty (30) days upon receipt of the charges. Within sixty (60) days of the charges or petition the board shall hold a formal hearing. A final decision shall be rendered by the board within sixty (60) days after hearing on the charges or petition is completed and a transcript of the hearing is received by the board."

Although the Rhode Island Supreme Court has interpreted the language of Section 28-7-9(b)(5) as requiring both informal and formal hearings, the court has not determined whether or not the time frame provisions of the statute are mandatory or directory. Rhode Island Department of Corrections v. Rhode Island State Labor Relations Board, 703 A.2d 1095 (R.I. 1997). As such, this Court looks to other cases wherein statutory language seemingly required that specific actions be taken within a statutory time period.

In Providence Teachers Union v. McGovern, 113 R.I. 169, 319 A.2d 358 (1974), the Rhode Island Supreme Court had the occasion to interpret the language contained in a collective bargaining agreement. The language in controversy required that "'arbitrators shall call a hearing within ten (10) days after their appointment * * * .'" Id. at 363. In finding that the time frame provision was directory rather than mandatory, the court noted that "provisions so designed to secure order, system and dispatch are generally held directory unless accompanied by negative words." Id. at 364. The court classified the provision as being relative to a "matter of procedure." Id. ; compare Clarke v. Morsilli, 714 A.2d 597 (R.I. 1998)(language contained in G.L. § 36-14-12(c) requires ethics commission to determine whether probable cause exists, to support ethics complaint, within set statutory time limits as time limits serve to apprise the investigated party of the commission's findings).

In Washington Highway Dev. v. Bendick, 576 A.2d 115 (R.I. 1990), the Rhode Island Supreme Court interpreted language contained in G.L. § 2-1-22 (c). That statute provided: "'following a public hearing, the director shall make his decision on the application and shall notify the applicant by registered mail, his attorney and any other agent or representative of the applicant by mail of his decision *within a period of six (6) weeks.*'" Id. at 115 (quoting § 2-1-22 (c)). Citing Providence Teachers Union, supra, and Beauchesne v. David London & Co. 118 R.I. 651, 375 A.2d 920 (1977) (failure of the Workers' Compensation Commission, to render a decision in accordance with statutory time provision, did not invalidate award), the court held that the time frame provision of § 2-1-22 (c) was directory and not mandatory. The court noted that the legislature had declined to affix, to this portion of the statute, a provision providing for sanctions for failure to meet the statutory time frame. Id. at 117.

After reviewing § 28-7-9(b)(5) and relevant case law, this Court finds that the time frame provisions of § 28-7-9(b)(5) are directory and not mandatory. As in Providence Teachers, the time frame provisions of § 28-7-9(b)(5) are clearly meant "to secure order, system and dispatch." Providence Teachers, 319 A.2d at 364. There is no language demonstrating an intent to make compliance a prerequisite to action or which serves to invalidate a tardy hearing. Id. ; See also, Washington Highway, 576 A.2d 116. Furthermore, the statute does not contain a limiting provision. See Cabana v. Littler, 612 A.2d 678 (R.I. 1992)(statute containing an affirmative direction followed by a limiting provision, *but not later than*, makes the affirmative direction mandatory). In conclusion, plaintiff's substantial rights have not been prejudiced by the non compliance with the time-frame provisions of § 28-7-9(b)(5).

Conclusion

After a review of the entire record this Court finds that the board's decision is supported by substantial, reliable and probative evidence of record and is not affected by error of law. Substantial rights of the plaintiff have not been prejudiced. Accordingly, the decision of the Board is affirmed.

Counsel shall submit an appropriate order for entry

EXHIBIT B

STATE OF RHODE ISLAND
BEFORE THE STATE LABOR RELATIONS BOARD

IN THE MATTER OF:

RHODE ISLAND STATE LABOR
RELATIONS BOARD

AND Case No. ULP-5231

TOWN OF BURRILLVILLE

AGREED STATEMENT OF FACTS

Now comes the Respondent, Town of Burrillville, and the Burrillville Local 369, IBPO and agree that the following shall be considered as facts by the Rhode Island State Labor Relations Board in this matter without the need of testimony to establish the same:

1. The Town of Burrillville is a municipal corporation, duly organized under the Constitution and General Laws of Rhode Island, with its headquarters at Burrillville Town Hall, 105 Harrisville Main Street, Harrisville, Rhode Island 02830.

2. Burrillville Local 369, International Brotherhood of Police Officers (IBPO), is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection.

3. On or about January 4, 1997, at approximately 1:30 a.m., the Burrillville Police responded to a report of a disturbance in an area outside of a Cumberland Farms located in Pascoag, Rhode Island. Patrolmen Edward S. Barrette, Jr., Raymond Z. Macomber IV and Timothy A. Geremia of the Burrillville Police Department responded to the scene. As

result of an investigation at the scene, a suspect was placed under arrest and transported to the police station. The individual arrested was suspected of driving a motor vehicle while under the influence of alcohol.

4. At the Burrillville Police Headquarters, Patrolman Timothy A. Geremia administered a breathalyzer test to the suspect. The suspect was later released by Patrolman Geremia and no charges were brought against the individual by the Burrillville Police Department.

5. Patrolman Timothy A. Geremia prepared an Officer's Narrative Police Report on the arrest of and the administration of the breathalyzer test to the suspect.

6. Patrolman Geremia filed the Officer's Narrative Report with Acting Deputy Chief Kevin San Antonio. The Officer's Narrative Report provided, in part:

> "At 0157 hours I began the fifteen minute observation period. At no point during this time did [the suspect] put anything into his mouth. I read [the suspect] the rights for use at the station and completed them at 0201 hours. At 0205 hours [the suspect] made a phone call. He then signed the rights form stating that he would take the test, the first phase of the test [suspect] had a .114% blood alcohol level. I then placed him in the cell. At 0259 hours [the suspect] took the second phase of the test. He had a blood alcohol level of .000%. During the first phase of the test Officer Macomber's radio mike had been keyed causing a false reading. At this point I released [the suspect] because of the inconsistent reading."

7. Patrolman Timothy A. Geremia also submitted to Acting Deputy Chief Kevin San Antonio a ticket he had previously written out for the suspect on the charge of driving under the influence. Patrolman Geremia noted on the voided ticket:

"Subject was not charged, due to a false reading on breathalyzer. Subj. passed 2nd phase."

8. Acting Deputy Chief Kevin San Antonio requested written statements from all of the officers involved concerning the facts and circumstances of the arrest and release of the suspect.

9. Acting Deputy Chief Kevin San Antonio also obtained written statements from the suspect and other witnesses at the scene of the arrest.

10. Acting Deputy Chief Kevin San Antonio also obtained a written statement from Paula Grottaduria, Senior Breath Analysis Inspector with the R.I. Department of Health.

11. Based upon the additional statements received from the officers and the witnesses, the Burrillville Police Department then began a criminal investigation of all of the officers involved in the arrest and release of the suspect.

12. On January 29, 1997, then Burrillville Police Chief Robert J. Tellier gave notice of the investigation to Patrolman Timothy A. Geremia, Edward S. Barrette, Jr., Raymond Z. Macomber IV, and Sergeant John R. Connors. The Police Chief further advised the police officers that they were under investigation and advised them of the rights afforded to them under the Law Enforcement Officer's Bill of Rights (G.L. 1956 42-28.6-1, et seq. The notice to each officer stated:

"You are advised that an investigation has been commenced by this Department concerning the facts and circumstances of the arrest of Michael Hauser on January 4, 1997, the administration of the Breathalyzer Test to Mr. Hauser on that date, the decision to not charge and release Mr. Hauser, and the reports prepared by members of the Burrillville Police

concerning the same. The name of the complainants are myself and Michael Hauser. You are under investigation. As part of this investigation, an interrogation of you will take place on _____(the time of each interrogation was scheduled to coincide with the end of the officers scheduled shifts).

The interrogation will take place in my office at Police Headquarters. The officer in charge of this investigation is Acting Deputy Chief Kevin San Antonio. He will be assisted in the investigation by Patrolman David M. Beauchemin. The questioning will be conducted by Acting Deputy Chief San Antonio. Officer Beauchemin will also be present during the interrogation.

You are further advised that you have the right to be represented by counsel of your choice who can be present at all times during the interrogation.

You are further advised that during the investigation you have the right to remain silent. You do not have to give a statement or answer any questions. If you give up your right to remain silent, anything you say can and will be used against you in a Court of Law. You have the right to the presence of an attorney and to talk with an attorney before and during any questioning. If you do answer any questions during the interrogation, you can stop at any time."

13. The interrogations of the above officers of the Burrillville Police Department were scheduled for various times on February 3, 1997 and February 4, 1997.

14. On January 30, 1997, Sergeant Lareto P. Guglietta, Secretary, Burrillville Local 369, IBPO, notified Acting Deputy Chief Kevin San Antonio that the officers under investigation by the Burrillville Police Department had "requested union officials be present during the interviews you have set". Sergeant Guglietta suggested alternative dates and times for the interviews to accommodate the schedules of "union officials"

wishing to be present.

15. On January 31, 1997, Ralph Ezovski, National Representative of the International Brotherhood of Police Officers telephoned Bruce E. Vealey, Esquire, Assistant Town Solicitor for the Town of Burrillville and requested that union officials be allowed to be present during the Police Department's interrogation of the officers. He also telefaxed a copy of the U. S. Supreme Court opinion in NLRB v. J. Weingarten, Inc. to the Assistant Town Solicitor.

16. In response, the Assistant Town Solicitor, Bruce E. Vealey, wrote to Ralph Ezovski on January 31, 1997. That letter stated as follows:

> "I have the NLRB v. J. Weingarten, Inc. case you sent to me. However, I disagree with your interpretation that the case is applicable to the issues at hand.
>
> Several officers of the Burrillville Police Department have been notified by the Chief of Police that they will be questioned as part of a police investigation. Their rights under such circumstances are governed by the Law Enforcement Officer's Bill of Rights Act. The officers have already been advised of their rights under that Act. All of those officers have a right to be represented by counsel, if they so choose, at all times during the questioning. However, it is the Town's position that only an attorney representing the officer being questioned will be allowed in the room during the interview. No other "union officials" will be allowed to attend.

17. Thereafter, the Assistant Town Solicitor, Bruce E. Vealey, received a telephone call from Gary E. Gentile, Esquire, General Counsel for Burrillville Local 369, IBPO. Attorney Gentile advised the Assistant Town Solicitor that he would be representing all of the officers at their interrogations. He further requested that the interrogations then scheduled for

February 3 and 4, 1997, be rescheduled to a new date to accommodate his schedule.

18. The Assistant Town Solicitor and the Union Attorney, Gary E. Gentile, agreed to rescheduled the interrogations for all of the officers to February 26, 1997, beginning at 10:30 a.m.

19. On February 24, 1997, the Assistant Town Solicitor sent to Attorney Gentile copies of the police reports previously prepared by Sergeant Connors and Patrolmen Macomber and Geremia regarding the arrest of the suspect and the administration of the Breathalyzer Test on January 4, 1997.

20. On February 26, 1997, beginning at 10:30 a.m. statements under oath were taken by Acting Deputy Chief Kevin San Antonio of Patrolmen Timothy A. Geremia, Raymond Z. Macomber, IV, and Sergeant John R. Connors. The Burrillville Local 369, IBPO's attorney appeared and represented all of the officers at their interrogations. Attorney Gentile was present throughout all of the interrogations.

21. All of the interrogations were given before Geraldine M. Meenan, a Notary Public. All statements by the officers were given under oath. Prior to the start of the interrogations, each officer was advised of his constitutional rights afforded to him by the United States Supreme Court in Miranda v. Arizona.

22. As part of his interrogation, Patrolman Timothy A. Geremia was asked the following questions by Acting Deputy Chief San Antonio:

> "Q. Do you know if anybody other than Michael Hauser blew into the Breathalyzer that night at the police station on January 4?

A. [Patrolman Geremia] No.

Q. Did you blow into the Breathalyzer during the second phase to get a 000 reading that night on January 4?

A. [Patrolman Geremia]. No."

23. After the completion of the interrogations and further investigation, the Burrillville Police Department turned over all of the results of its investigation to the Rhode Island State Police.

24. After further investigation, the Rhode Island State Police referred the matter to the Rhode Island Department of Attorney General for criminal prosecution.

25. On February 7, 1997, Burrillville Local 369, IBPO, filed a charge of unfair labor practices against the Town of Burrillville. The charge filed by the Burrillville Local 369, IBPO stated:

> "Burrillville Local 369, IBPO alleges that the Town of Burrillville violated the General Laws of R.I., specifically R.I.G.L. 28-7-12 and 28-7-13 (3), (5), (7) and (10) on January 31, 1997, when it informed members of the bargaining unit that they could not have a union representative present at a disciplinary interview. Members sought to invoke their Weingarten rights, and the Town Solicitor still refused to allow a union representative to be present at the interview."

26. On February 7, 1997, the Rhode Island State Relations Board notified the Town of Burrillville of the filing of the charge of unfair labor practices and that an informal conference on the charge was scheduled before the Rhode Island State Labor Relations Board on March 5, 1997, at 9:00 a.m.

27. On March 5, 1997, an informal conference on the charge was held before Donna M. Geoffroy, Agent of the Rhode Island

State Labor Relations Board. Representatives of the Town of Burrillville and Burrillville Local 369, IBPO attended the conference.

28. On September 8, 1997, a Providence County Grand Jury returned an Indictment against Patrolman Timothy A. Geremia in State of Rhode Island v. Timothy A. Geremia, Indictment No. P1/97-2959A. Count I of the Indictment alleged as follows:

> "That TIMOTHY A. GEREMIA,, alias John Doe, of Providence County, on or about the 26th day of February, 1997, at Burrillville, in the County of Providence, did then and there commit the crime of perjury by falsely, knowingly, maliciously, willfully and corruptly providing a sworn statement to Sergeant Kevin San Antonio, Acting Deputy Chief of the Burrillville Police Department, that he did not blow into the Intoxilyzer Alcohol Analyzer Model 5000 (SN-66-004101) located at the Burrillville Police Station on January 4, 1997, a false declaration of material fact, made while under oath administered by Geraldine M. Meenan, Notary Public, a person duly authorized to administer oaths in this State and with competent authority to administer an oath in violation of 11-33-1 and 11-33-2 of the General Laws of Rhode Island, 1956, as amended (Reenactment of 1994)."

Count 2 of the Indictment alleged:

> "That Timothy Geremia, alias John Doe, of Providence County, on or about the 4th day of January, 1997, at Burrillville, in the County of Providence, did knowingly give to an agent, employee, servant in public or private employ, or public official, to wit Kevin San Antonio, Acting Deputy Chief of the Burrillville Police Department, documents, to wit, Officer's Narrative Report, and/or, a voided ticket (#ZZ 146131) for Driving under the Influence, and/or test results from the Intoxilyzer Alcohol Analyzer Model 5000 (SN-66-004101) dated January 4, 1997, which contained a false, erroneous or defective statement, in an important particular, and which to his knowledge was intended to mislead Kevin San Antonio in violation of 11-18-1 of the General Laws of Rhode Island, 1956, as amended (Reenactment of 1994).

29. On May 1, 1998, Patrolman Timothy A. Geremia, entered a plea of nolo contendere to Count 2 of the Indictment in State of Rhode Island v. Timothy A. Geremia, Indictment No. P1/97-2959A, wherein he had been charged with the filing of a false report to Acting Deputy Chief Kevin San Antonio. (Count 1 of the Indictment was voluntarily dismissed by the Department of the Attorney General under Rule 48 (a) of the Rhode Island Rules of Criminal Procedure as part of plea negotiations involving the Defendant, the Department of the Attorney General, and the Town of Burrillville). Upon the acceptance of his plea, a Justice of the Rhode Island Supreme Court entered a Judgment and Disposition against Patrolman Timothy A. Geremia. Patrolman Geremia was adjudged as guilty as alleged in Count 2 of the Indictment. He was placed on probation for a period of one (1 year. He was also ordered to contribute the sum of $30.00 to the Crime Victim Indemnify Fund and the sum of $60.00 to the Probation Fund.

30. On October 15, 1998, the Rhode Island State Labor Relations Board issued a Complaint of Unfair Labor Practices against the Town of Burrillville. (Rhode Island State Labor Relations Board and Town of Burrillville, Case No. ULP-5231.

31. On or about October 15, 1998, Donna M. Geoffroy, Agent of the Rhode Island Labor Relations Board, served the Complaint of Unfair Labor Practices on the Respondent, Town of Burrillville, by mailing copies of said Complaint to members of the Burrillville Town Council and other representatives of the Town.

32. As part of the service of the Complaint of Unfair

Labor Practices in this matter, on or about October 15, 1998, Donna M. Geoffroy, Agent of the Rhode Island State Labor Relations Board, notified the Respondent that the formal hearing on the Complaint of Unfair Labor Practices against the Town of Burrillville was scheduled for February 23, 1997, at 9:00 a.m.

33. Section 2.3 of the 1995-98 Contract Agreement Between the Town of Burrillville and the Burrillville Police I.B.P.O. Lodge provides as follows:

> "DISCHARGE AND DISCIPLINE:
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> The procedure for discharge and discipline of Police Officers shall be in accordance with the Law Enforcement Bill of Rights (G.L. 48-28.6-1) as amended."

AGREED TO AS TO FORM
AND SUBSTANCE:

GARY GENTILE, ESQUIRE LEGAL COUNSEL BURRILLVILLE LOCAL 369, IBPO	BRUCE E. VEALEY, ESQUIRE ASSISTANT TOWN SOLICITOR TOWN OF BURRILLVILLE

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